

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
NATIONAL FOOD CORPORATION,

Appellant,

v.

SPOKANE COUNTY AIR POLLUTION
CONTROL AUTHORITY,

Respondent.

PCHB Nos. 891, 906 and 922

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the consolidation of four separate appeals arising from alleged violations of Article VI, Section 6.04 of Regulation I of the Spokane County Air Pollution Control Authority having come on regularly for hearing on the 25th day of November, 1975 in Spokane, Washington, and appellant National Food Corporation appearing through its attorney, Dennis A. Dellwo, and respondent Spokane County Air Pollution Control Authority appearing through its attorney, James P. Emacio, Deputy Prosecuting Attorney for Spokane County with William A. Harrison, hearing examiner presiding, and the Board having read the transcript,

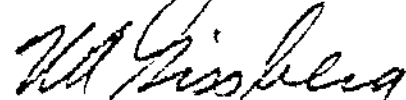
1 considered the exhibits, records and files herein and having reviewed
2 the Proposed Decision of the presiding officer entered on the 30th day
3 of December, 1975 and served upon all parties herein by certified mail,
4 return receipt requested and twenty days having elapsed from said
5 service; and

6 The Board having considered Appellant's Statement of Exceptions
7 to the Proposed Decision of the presiding officer and having denied
8 same; and the Board being fully advised in the premises; now therefore,

9 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed
10 Decision of the presiding officer, dated the 30th day of December, 1975,
11 and incorporated by reference herein and attached hereto as Exhibit A,
12 is adopted and hereby entered as the Board Final Findings of Fact,
13 Conclusions of Law and Order herein.

14 DONE at Lacey, Washington, this eighth day of April, 1976.

15 POLLUTION CONTROL HEARINGS BOARD

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17 W. A. GISSBERG, Member

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19 WALT WOODWARD, Member

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PROPOSED DECISION

This is a consolidation of four separate appeals by National Food Corporation (NFC) arising from alleged violations of Article VI, Section 6.04 of Regulation I, of the respondent, Spokane County Air Pollution Control Authority (SCAPCA). The dates of the alleged violations, the civil penalty assessed, and the PCHB case number are as follows, and are listed in the order in which they will be considered here:

1. February 24, 1975, \$100.00, PCHB No. 891.
2. June 17, 1975, \$100.00, PCHB. No. 891.

EXHIBIT A

1 3. September 23, 1975, \$150.00, PCHB No. 922.

2 4. August 2, 1975, \$100.00, PCHB No. 906.

3 These matters came on for consolidated hearing before the
4 Pollution Control Hearings Board (William A. Harrison, Hearing
5 Examiner, presiding alone), convened in Spokane on November 25, 1975.
6 Neither party having elected a formal hearing, the hearing was declared
7 to be informal as described in RCW 43.21B.140 and .230.

8 Appellant, NFC, appeared by and through its attorney Dennis
9 A. Dellwo. Respondent, SCAPCA, appeared by and through its attorney,
10 James P. Emacio, Deputy Prosecuting Attorney for Spokane County.
11 Witnesses were sworn and testified. Exhibits were admitted.

12 This decision is written in five parts. The first part states
13 the applicable law, which law we find to be the same for each of the
14 four appeals. The following four parts set out findings of fact,
15 conclusions of law, and an order in each of the four appeals.
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I.

LAW APPLICABLE

The four Notices of Violation admitted into evidence (R-3, R-4, R-8 and R-9) each recite that appellant, NFC, was:

" . . . in violation of Article IV Section 6.04 of Spokane County Air Pollution Control Authority Regulation I"

This citation contains the following regulatory language which was officially noticed:

"Section 6.04 Odors and Nuisances

A. Effective control apparatus and measures shall be installed and operated to reduce odor-bearing gases and particulate matter emitted into the atmosphere to a reasonable minimum.

"B. The Board or Control Officer may establish reasonable requirements that the building or equipment be closed and ventilated in such a way that all the air, gas, and particulate matter are effectively treated for removal or destruction of odorous matter or other air contaminants before emission to the atmosphere."

I note in passing that appellant, NFC, raised no challenge to the validity of this regulation. This regulation is one of a type commonly called an "emission standard" and is authorized by the Washington Clean Air Act, 70.94 RCW.

I also take official notice of respondent's Regulation I which has been filed by respondent pursuant to RCW 43.21B.260. Section 2.11 of Regulation I provides for a fine of up to \$250 per day for each violation of Regulation I. Article III of Regulation I provides for variances from Regulation I. Section 6.08 of Regulation I provides that:

"A. The owner or operator of a source which emits pollutants exceeding any of the limits established by this Regulation as a direct result of unavoidable

upset conditions or unavoidable and unforeseeable breakdown of equipment or control apparatus may be exempt from penalties if:

"1. The upset or breakdown is reported to the Authority on the next regular working day.

"2. The owner or operator shall, upon request of the Control Officer, submit a report giving:

"a. The causes.

"b. The steps to be taken to repair the breakdown, and

"c. A time schedule for the completion of the repairs.

"B. The Control Officer on receipt of a report (Subsection A.2.) from the owner or operator describing a breakdown may:

"1. Allow continued exempt operation but only for a limited time period, after which the owner or operator will be required to comply with this Regulation or be subject to the penalties in Section 2.11. An exemption granted under this Section 6.08, may be withdrawn if the exempt operation becomes a cause of complaints.

"2. Require that the plant curtail or cease operations until repairs are completed if the quantity of pollutants or the nature of the pollutants could cause damage."

Air pollution is defined in Section 1.04(c) of Regulation I as "the presence in the outside atmosphere of one or more air contaminants in sufficient quantities . . . which unreasonably interferes with enjoyment of life and property." Section 1.04(B) of Regulation I provides that "air contaminant" includes "odorous substance."

In summary, I observe two distinct elements to an odor pollution violation of 70.94 RCW and the regulations promulgated thereunder:

1. Unreasonable interference in fact. (Section 1.04(C), Article I, SCAPCA Regulation I).

2. Failure to reduce odors to a reasonable minimum (Section 6.6 , Article IV, SCAPCA Regulation I).

II.

ALLEGED VIOLATION OF FEBRUARY 24, 1975

Findings of Fact

1. As early as mid-1974 SCAPCA agents made a verbal request of NFC that it declare its plan for odor control in connection with an egg-laying farm owned by NFC and located near Deer Park in the vicinity of Spokane, Washington.

2. By letter dated July 5, 1974 (R-2) NFC centered its comments, and this appeal centers, on the disposal of accumulated chicken litter. As to a disposal plan for this litter, NFC declared in the above letter, "The waste from the farm is currently being hauled away from the farm each day and plowed underground, the same would apply to the new buildings."

3. Acting on the complaint of a citizen residing nearby, SCAPCA dispatched an agent to investigate reported strong odors on NFC property northeast of NFC Laying Plant No. 2. This was on the morning of February 24, 1975.

4. Upon arrival the SCAPCA agent detected massive ammonia and "rotten-egg" odors sufficient to cause an average man to leave the area until the odor subsided.

5. The odor emanated from at least 25 tank truck loads of chicken litter which NFC employees were spreading over a 50-75 yard long strip. The strip had been plowed of snow, which was then in abundance, but the litter was spread either onto the snow or the frozen ground.

6. No attempt was made to plow the litter under, due to the frozen condition of the ground. No attempt was made to cover the

1 litter with snow until later requested by the agent of SCAPCA.

2 7. A Notice of Violation (R-3) was issued on March 3, 1975,
3 which also included the assessment of a \$100 civil penalty. This
4 penalty was "suspended" by SCAPCA provided that NFC incurred no
5 additional Notices of Violation for odor pollution within the fol-
6 lowing six months. This Notice of Violation was therefore rein-
7 stated with issuance of a Notice of Violation dated June 20, 1975.

8 Conclusions of Law

9 1. Employees of NFC who were spreading the litter knew that
10 its odor caused unreasonable interference for two reasons:

11 a. The testimony by the SCAPCA agent present as
12 to the extremity of the odor went substantially
13 uncontradicted. So also did testimony that other
14 persons resided within range of the odors.

15 b. The NFC letter of July 5, 1974 (R-2) acknowl-
16 edges the propriety of plowing the litter under-
17 ground implying that unreasonable odors arise if
18 mere spreading is done without more.

19 2. The odors emanating from NFC's litter-spread unreasonably
20 interfered with life and property due to the uncontroverted testimony
21 of a telephoned citizen's complaint plus those factors mentioned in
22 the above paragraph.

23 3. The spreading of 25 tank truck loads of chicken litter,
24 in proximity to human residences, without any attempt to simultan-
25 eously properly cover such litter, constituted a failure to take
26 effective control measures to reduce odor-bearing matter to a
27 reasonable minimum.

28 Order

29 The violation and accompanying assessment of a \$100 civil
30 penalty are each hereby affirmed.

III.

ALLEGED VIOLATION OF JUNE 17, 1975

Findings of Fact

1. In "suspending" the Notice of Violation pertaining to events of February 24, 1975 (above), SCAPCA requested (letter, R-3) that NFC "respond . . . in writing indicating what steps are being taken to correct the present situation and what is planned as the permanent disposal method" of the chicken litter.

2. By return letter (R-6), NFC replied, "Discing the slurried manure into the soil is the proposed method to contain odors and flies."

3. Following these communications, four or five complaints were received by SCAPCA from citizens regarding strong odors emanating from property now owned by NFC and located northwest of NFC Laying operations.

4. A SCAPCA agent was dispatched to investigate these complaints and arrived at the described location in the late afternoon of June 17, 1975. At that time the SCAPCA agent detected massive ammonia and "rotten-egg" odors sufficient to cause an average man to leave the area until the odor subsided.

5. The odor emanated from large quantities of chicken litter which were applied to the ground as fertilizer pursuant to an oral agreement between NFC and the property owner, Mr. Ericksen.

6. The agreement between NFC and Mr. Ericksen was that NFC promised to deliver and spread chicken litter on Mr. Ericksen's fields in exchange for Mr. Ericksen's promise to disc or plow the litter under (and perhaps other consideration as well).

1 7. At approximately 8:00 a.m. on June 17, 1975, employees
2 of NFC arrived on the Ericksen property and began spreading the
3 litter. Mr. Ericksen, who would personally plow the litter under,
4 was not present during spreading since he was attending to his
5 regular employment elsewhere between the hours of 8:00 a.m. and
6 5:00 p.m. Employees of NFC were fully aware of Mr. Ericksen's
7 nonavailability until 5:00 p.m. but began spreading at 8:00 a.m.
8 anyway. The NFC employees believed that where spreading occurred
9 off of NFC land it was the exclusive duty of the landowner, and not
10 NFC, to plow the litter under. The spread continued all day.

11 8. A Notice of Violation with \$100 civil penalty was issued
12 by SCAPCA to NFC on June 20, 1975.

13 Conclusions of Law

14 1. Employees of NFC who were spreading the litter knew that
15 its odor caused unreasonable interference for two reasons:

16 a. The testimony by the SCAPCA agent present
17 as to the extremity of the odor went substan-
18 tially uncontradicted. So did testimony that
other persons resided within range of the odors.

19 b. The NFC letter of March 13, 1975 (R-6)
20 acknowledges the propriety of discing the
21 litter underground implying that unreasonable
odors arise if mere spreading is done without
more.

22 2. The odors emanating from NFC's litter-spread unreasonably
23 interfered with life and property due to the uncontroverted testimony
24 of four or five telephoned citizens' complaints plus those factors
25 mentioned above.

26 3. The spreading of chicken litter over fields, in proximity
27 to human residences without any attempt to simultaneously cover

1 or plow under such litter constituted a failure to take effective control
2 measures to reduce odor-bearing matter to a reasonable minimum.

3 In reaching this conclusion I decline to analyze who held title
4 to either the chicken litter or the land it was spread upon. Those
5 questions are irrelevant under 70.94 RCW and Regulation I. NFC knew that
6 plowing under could not begin until roughly eight hours after NFC began
7 the spread. Conclusion of Law Nos. 1 and 2 (above) determine that NFC
8 knew that spreading without plowing was "air pollution." It is therefore
9 accurate to say that NFC caused air pollution by odors and therefore the
10 duty of reducing such odors to a reasonable minimum attached to them.
11 NFC may certainly delegate the duty of reducing the odors (by plowing)
12 via contract with another person. What NFC may not do is to delegate
13 the plowing duty to another, then proceed to spread while fully aware
14 that such person could not or would not plow under until hours after the
15 spread. If no one is plowing, NFC must stop spreading. No delegation of
16 duties is sufficient to relieve a person of responsibility for air
17 pollution where such person can yet be found to have caused air pollution.

18 Order

19 The violation and accompanying assessment of a \$100 civil
20 penalty are each hereby affirmed.

IV.

ALLEGED VIOLATION OF SEPTEMBER 23, 1975

Findings of Fact:

1. On August 13, 1975, SCAPCA wrote a letter to NFC (R-10) setting out a six-point guideline to compliance with the law applicable to this appeal. Point No. 5 of that letter stated "Litter spread on open fields shall be covered immediately by plowing, discing or shoveling over." Point No. 6 of that letter stated "Litter shall be spread only during periods of southwest wind and during the hours of 9:00 a.m. and 4:00 p.m. It is proposed that your firm install a wind station for this purpose."

2. The requirement of "southwest wind" above resulted from the location of past NFC litter spreads relative to the suburb of Deer Park and the residential community known as Mountain View. Deer Park being generally to the west of NFC spread areas and Mountain View being generally to the southeast, only a southwest wind would carry odors entirely away from these major communities.

3. By return letter (A-1), NFC stated its understanding and willingness to comply with SCAPCA's six-point guideline which was modified by oral negotiations to allow litter disposal to begin at 8:00 a.m. rather than 9:00 a.m.

4. To scientifically establish the direction of wind, SCAPCA followed their own suggestion by installing a wind station on NFC Laying Farm No. 1.

5. Subsequent to these events, SCAPCA received a complaint from a resident of the Mountain View community regarding strong odors emanating from property located to the southeast of Mountain

1 View. The testimony, at the hearing, of this complainant (Mr.
2 Flatter) was that neither he nor his family could consume their
3 meals or otherwise stand the odor without closing every window in
4 their home and relying on an air conditioning system which used only
5 air within the house. No enjoyment of his outdoor property was pos-
6 sible on the day in question, September 23, 1975. This testimony
7 was uncontradicted and I find it to be fact.

8 6. A SCAPCA agent was dispatched to investigate these com-
9 plaints and arrived at the described location at approximately 8:00
10 a.m. on September 23, 1975. At that time employees of NFC were spread-
11 ing large quantities of chicken litter on fields owned by a Mr.
12 Baker pursuant to an agreement between NFC and Mr. Baker. This
13 agreement was that NFC would deliver and spread chicken litter and
14 that Mr. Baker would simultaneously plow it under. At all times
15 relevant to this appeal Mr. Baker did plow the litter under while
16 NFC spread it.

17 8. NFC began the spread at 7:00 a.m. on September 23, 1975.
18 The paper record of SCAPCA's wind station (R-11) revealed wind from
19 the northwest at 7:00 a.m. For an extended period of time prior
20 to September 23, 1975 wind had prevailed from the northeast. The
21 paper record of SCAPCA's wind station revealed wind from the south-
22 southeast from 8:00 a.m. until at least 8:27 a.m. at which time
23 a violation was noted in a Notice of Violation issued on September 24,
24 1975. This Notice of Violation assessed a \$150 fine. I find as
25 fact that those wind directions recorded on the SCAPCA wind-station
26 were those prevailing at the time and location here involved.

1 Conclusions of Law

2 1. Employees of NFC who were spreading the litter knew that
3 its odor caused unreasonable interference: the NFC letter of September
4 10, 1975, (A-1) acknowledged the propriety of spreading litter only
5 with plowing and proper wind direction implying an understanding
6 that unreasonable odors arise if wind is toward a major community
7 of homes.

8 2. The odors emanating from NFC's litter-spread unreasonably
9 interfered with life and property based upon the testimony of Mr.
10 Flatter which was that a person present (at his home) at the time and
11 place involved was subjected to an extreme and unbearable odor. Such
12 testimony was uncontradicted.

13 3. NFC began its spread at 7:00 a.m. when the wind was from
14 the northwest. Although point No. 6 of R-10 requires wind from the
15 southwest, such requirement was based on previous NFC spreads and
16 that any wind which carried odor away from Deer Park, Mountain View
17 or other communities of their size, would be satisfactory. Because
18 of the location of the Baker property a northwest wind would have
19 been satisfactory.

20 Although NFC recited its willingness to spread litter with
21 proper wind direction between 8:00 a.m. and 4:00 p.m. (A-1), they
22 began at 7:00 a.m. when the wind was proper and continued past 8:00
23 a.m. when the wind was improper. This I find difficult to understand
24 in view of the presence of a wind direction machine, even if wind
25 direction were not determinable by usual qualitative methods.

26 I conclude that this conduct constituted a failure to take
27 effective control measures to reduce odor-bearing matter to a

reasonable minimum.

Order

The violation and accompanying assessment of a \$150 civil penalty are each hereby affirmed.

V.

ALLEGED VIOLATION OF AUGUST 2, 1975

Findings of Fact:

1. In the cold weather of the first quarter of 1975, NFC directed the installation of a poultry watering system at their High Valley Pullet Farm. This farm is located near Deer Park in the vicinity of Spokane, Washington.

2. The litter from pullets (immature hens) is of a much drier nature than that of mature birds so that odor from pullet litter is generally less disagreeable than that of mature hens.

3. Due to cold weather, glue used in joining the pipes of the poultry watering system became ineffective. Drippage from the system fell into pullet litter, the litter became wet and unusually strong odors resulted.

4. SCAPCA became aware of these odors by fielding complaints from citizens. Agents of SCAPCA informed NFC of the problem in May, 1975.

5. NFC attempted to correct this unusual situation by adding dampeners to valves from which the pullets drank and by attempts to correct the leaking joints.

6. By mid-July, 1975, the wet litter had begun to flow out from the bottom of the NFC pullet house and NFC constructed dikes to contain it. A SCAPCA agent investigating the NFC premises ordered NFC, however, to remove the odorous wet litter by pumping. This was on or about July 24, 1975.

7. Since wet litter was unusual on the pullet farm, NFC officials there requested a pump to be brought over from a nearby

1 NFC laying farm. This was done and the litter was pumped all
2 day on July 26, 1975, until the pump broke down. Substantial
3 litter remained although the bulk of it was removed.

4 8. Through misunderstanding, NFC officials at the laying
5 farm understood the pumping to be complete and took the pump
6 back on the evening of July 26, 1975. The pump was repaired
7 but remained in use at the laying farm until after the time of
8 the alleged violation.

9 9. On August 2, 1975, a SCAPCA agent was dispatched to the
10 NFC High Valley Pullet Farm in response to the complaint of a
11 citizen who resides across the road from the farm. Wet litter
12 was found. A Notice of Violation was issued on August 5, 1975,
13 citing a violation on August 2, 1975, and assessing a \$100 civil
14 penalty.

15 10. Very shortly after August 2, 1975, the remaining wet
16 litter was pumped when officials at the laying farm made the pump
17 available. The leakage in the poultry watering system was sub-
18 stantially repaired by this time.

19 Conclusions of Law:

20 1. The drippage which caused the odor was not intentionally
21 caused. Nevertheless, the continuous maintenance of such wet litter
22 on the premises imparted notice upon appellant of the problem.

23 2. The odors emanating from NFC's litter-spread unreasonably
24 interfered with life and property based upon the testimony of a
25 citizen, Mr. Garred, who was present at his home across the road
26 from the pullet farm. I find as fact Mr. Garred's relation of the
27 extremity of the odor on August 2, 1975.

1 3. That odor which is a reasonable minimum is the acceptable
2 level of odor, as measured by a "reasonable man" standard, resulting
3 after implementation of reasonable attempts to control the odor
4 under normal conditions. Appellant was having difficulty with the
5 proper operation of its equipment. The leaking pipes certainly were
6 not normal. The additional odor (which was substantial) generated
7 from the wet litter as a result of the dripping water exceeded the
8 reasonable minimum odor allowed. The excess odor generated, which
9 also materially interfered with the use and enjoyment of the nearby
10 landowner's property, constituted a violation of Section 6.04 of
11 Regulation I.

12 Appellant may not have suffered the penalty imposed here had
13 it timely reported its problem to respondent as provided by Section
14 6.08 of Regulation I. If the problem was of a longer duration,
15 appellant had an opportunity to seek a variance as provided by Article
16 III of Regulation I. Appellant has not attempted to do either, and
17 as such, has not exempted itself from the penalties provided for in
18 Section 2.11 of respondent's Regulation I.

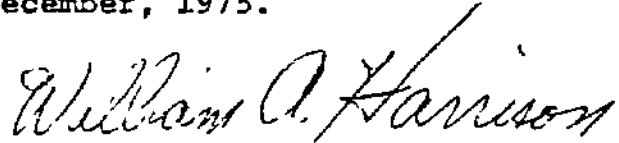
19 In mitigation of the penalty, however, I am unable to say
20 that the accumulated efforts taken by NFC to control the odor after
21 it became a problem were less than reasonable. Almost immediately
22 after the SCAPCA request, the bulk of the wet litter was pumped out.
23 Because of internal misunderstandings, the remainder went unpumped
24 for a week while the loaned suitable pump was in use at another NFC
25 facility. Prior to the pumping request sincere efforts were begun
26 to correct the new and sophisticated watering system which efforts
27 had largely succeeded by the date of the violation (August 2, 1975).

1 Based upon these efforts, I conclude that the \$100 civil penalty
2 should be suspended.

3 Order

4 The violation and accompanying assessment of a \$100 civil
5 penalty are each hereby affirmed but payment thereof is suspended
6 upon condition that there be no further violations of Regulation I
7 at the High Valley Pullet Farm for a period of six months from the
8 date that this Order becomes final and effective.

9 DATED this 30th day of December, 1975.

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11 WILLIAM A. HARRISON
12 Hearing Examiner
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